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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NO. ~~107~~

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF AMICUS CURIAE OF EMPIRE STATE PETROLEUM ASSOCIATION, INC., OHIO PETROLEUM MARKETERS ASSOCIATION, INC., ILLINOIS PETROLEUM MARKETERS ASSOCIATION, INDIANA INDEPENDENT PETROLEUM ASSOCIATION, INC., IOWA INDEPENDENT OIL JOBBERS ASSOCIATION, WISCONSIN PETROLEUM ASSOCIATION, SOUTH DAKOTA INDEPENDENT OIL MEN'S ASSOCIATION, NEBRASKA PETROLEUM MARKETERS, INC., FLORIDA INDEPENDENT PETROLEUM MARKETERS ASSOCIATION, PENNSYLVANIA PETROLEUM ASSOCIATION, INC., VIRGINIA PETROLEUM JOBBERS ASSOCIATION AND NORTH CAROLINA OIL JOBBERS ASSOCIATION.

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THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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This *amicus curiae* brief is filed (with the consent of the parties pursuant to Rule 27, paragraph 9) by Empire State Petroleum Association, Inc., a trade association of 225

independent New York gasoline jobbers, Ohio Petroleum Marketers Association, Inc., a trade association of 200 independent Ohio gasoline jobbers, Illinois Petroleum Marketers Association, a trade association of 508 independent Illinois gasoline jobbers, Indiana Independent Petroleum Association, Inc., a trade association of 248 independent Indiana gasoline jobbers, Iowa Independent Oil Jobbers Association, a trade association of 350 independent Iowa gasoline jobbers, Wisconsin Petroleum Association, a trade association of 300 independent Wisconsin gasoline jobbers, South Dakota Independent Oil Men's Association, a trade association of 335 independent South Dakota gasoline jobbers, Nebraska Petroleum Marketers, Inc., a trade association of 268 independent Nebraska gasoline jobbers, North Carolina Oil Jobbers Association, a trade association of 168 independent North Carolina gasoline jobbers, Virginia Petroleum Jobbers Association, a trade association of 40 independent Virginia gasoline jobbers, Florida Independent Petroleum Marketers Association, a trade association of 80 independent Florida gasoline jobbers, and Pennsylvania Petroleum Association, Inc., a trade association of 101 Pennsylvania gasoline jobbers.

This case involves the legality, under Section 2(b) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. 13, par. a.), of a difference in price made in *good faith* to meet the equally low price of a competitor, when the Federal Trade Commission makes a finding that such good faith competition adversely affects competition.

While the order before this Court was entered against petitioner,[1] its main force is directed at gasoline jobbers

[1] Throughout this brief Standard Oil Company, the petitioner in this Court, is referred to as "petitioner."

and attacks their functional discount. The sanctions imposed deal a death blow to those jobbers who suppliers also sell to retailers in the same area. It also restricts the opportunities of jobbers generally. Petitioner's brief does not adequately show the serious impact of the order on jobbers.

The Circuit Court alarmed jobbers when it advised petitioner that in order to comply with the order it could either—

> "First, discontinue selling to wholesalers at a price different than that made to retailers. * * * The petitioner argues that this is an elimination of wholesalers. If this be true, it is elimination only where their existence cannot be justified except on the exploitation of a differential in price not justified by any cost savings to obtain that price. This does not impress us as either illegal, unwarranted, or unjust.
>
> "Secondly, the petitioner may under the right to choose its customers refuse to sell to wholesalers who sell to retailers below the price the petitioner makes to its own retailers" (Rec. 5304; 173 F. 2d 210, 217).

The conclusion of the lower court that elimination of gasoline jobbers (of whom there are 12,000 in the United States—R. 5249) is neither illegal, unwarranted, nor unjust is a compelling reason for this brief. We do not believe that conclusion could have properly been reached with a full understanding of its impact or of the importance of jobbers as a factor in the competitive marketing of petroleum.

In spite of the jobbers' apparent interest in the question, the Commission denied the National Council of Independent Petroleum Associations leave to intervene for the

purpose of opposing the order (R. 5254). The successor to that organization, The National Oil Jobbers Council recently adopted a resolution describing the effect of the order as "wholly arbitrary, capricious, and unjustifiable."[2]

[2] Printed Hearings on S.1008 (81st Congress) House Committee on the Judiciary, p. 65.

ARGUMENT

THE APPLICATION TO, AND UNREASONABLE IMPACT ON, JOBBERS OF THE COMMISSION'S ERRONEOUS AND ILLOGICAL CONSTRUCTION OF SECTION 2(b) OF THE CLAYTON ACT.

Petitioner sold gasoline to each of its retail station customers in Detroit in tank wagon quantities at its tank wagon price. It sold to each of its jobber-wholesaler customers in tank car quantities at its tank car price, which was 1½¢ a gallon below its tank wagon price. This functional jobber discount was held to be an illegal price discrimination in violation of the Robinson-Patman Amendment to the Clayton Act (15 U.S.C. 13). The Commission held inapplicable the provision, in clear language, of Section 2(b) of the Act permitting a seller to justify a discrimination by showing that he made the lower price in good faith to meet the equally low price of a competitor.

The record shows that the questioned practice reflects the normal and customary manner in which gasoline is sold not only in Detroit but throughout the United States. There are 130 licensed gasoline jobbers in Wayne (Detroit) County (R. 4857-9). The 126 who bought from suppliers other than petitioner purchased in tank car quantities at tank car prices just as the petitioner's four jobber customers did.

The trial examiner found that—"Long prior to the [Robinson-Patman Act], the jobber system of distribution was widely employed in the oil industry, and the term 'jobber' was generally understood to mean one who was engaged in the purchase and sale of petroleum products (and particularly with reference to gasoline), who had

sufficient storage to take delivery in tank-car quantity and resold a substantial part to resellers and the remainder direct to the public through retail service stations operated by him" (R. 5096).

The trial examiner also found that—"Each [of petitioner's four jobber customers], at the time of recognition [as a jobber], and at all times thereafter, possessed all the qualifications for classification as a jobber exacted by (1) the generally understood meaning in the oil industry of the term 'jobber'; (2) the definition of the term 'Approved by the Federal Trade Commission'; and (3) [petitioner's] own standard" (R. 5097).

The trial examiner reached the "Conclusion of Fact" that the "differentials on its branded gasoline" that petitioner made to its four jobbers "were granted to meet equally low prices offered by competitors on *branded gasoline of comparable grade and quality*"[3] (R. 5104).

The Commission did not overrule these findings of its trial examiner. It found, however, that—"It is not material whether the discriminations in price granted by the [petitioner] to the said four dealers were made to meet equally low prices of competitors. * * * even though the lower prices in question may have been made by [petitioner] in good faith to meet the lower prices of competitors, this does not constitute a defense in the face of affirmative proof" that there was an injury at the retail station level (R. 5179).

The Circuit Court said that the four customers to whom petitioner made the lower price "were also known as wholesale customers" (R. 5295; 173 F. 2d 210, 212). As to petitioner's good faith in making the lower price, the Circuit Court said—"There is substantial evidence in this record, *and we think it may be assumed to be conclusive,* to the

[3] Emphasis in quotations is supplied throughout this brief, unless otherwise noted.

effect that the petitioner made its low price to [the four jobber-wholesaler customers] *in good faith to meet the lower price of a competitor*" (R. 5297; 173 F. 2d 210, 213).

Of the Commission's view as to petitioner's good faith, the Circuit Court said—"Now as to the contention that the discriminatory prices here complained of were made in good faith to meet a lower price of a competitor. While the Commission made no finding on this point, *it assumed its existence* but held, contrary to the petitioner's contention, that this was not a defense" (R. 5299; 173 F. 2d 210, 214).

A. THE ORDER WILL NOT PREVENT THE JOBBERS FROM BUYING AT TANK CAR PRICES.

As previously indicated, a jobber owns bulk storage and truck distribution facilities. Historically the jobber performed the marketing functions of independent refiners. In recent years, however, the jobber has generally started in business as a small retailer. This small retailer may, under our free enterprise system, expand his operations through acquiring additional stations and securing the business of others until he has an adequate volume to justify acquisition of a bulk plant. He is then able to purchase in tank car quantities. As the Retail Gasoline Dealers' Association of Michigan correctly pointed out in its *Amicus Curiae* brief in the court below (pp. 8-9), petitioner did not encourage retailers to acquire facilities which would enable them to buy in tank car quantities. But, a gasoline buyer who acquires a bulk storage plant and a fleet of trucks and has sufficient volume to buy in tank car quantities, *can not be prevented from buying at tank car prices* whether his supplier likes it or not. If his old supplier refuses to sell to him in tank car quantities at tank car prices he may take his business to another who will. Neither is required to do business with the other. Each is free to compete for the best terms of sale. The business expansion to the status of

"jobber" represents an economic advancement for a small businessman.

Since the Robinson-Patman Amendment has no application to a seller who charges the same price to all his customers, refiners who sell only at wholesale in tank car quantities are not within the provisions of the Act. Their jobbers may resell either at retail or to retailers below the going tank wagon price without consequence to either the refiner or the jobber. Price cutting *by jobbers whose suppliers sell only at wholesale* would not permit invoking the sanctions under the Robinson-Patman Amendment even as construed by the Commission in this case.

The order in terms thus operates only against jobbers supplied by refiners who maintain dual distribution, selling to both retailers and wholesalers. Since there will always be some refiners who sell only in tank car quantities to tank car buyers, and would therefore be free to sell to jobbers at tank car prices, the jobbers will continue to be free to purchase at tank car prices from such suppliers. Those jobbers, however, whose suppliers now employ dual methods of distribution will be required to either: (1) transfer their business to a supplier who sells only in tank car quantities; (2) sell out to their supplier who will then take over their distribution functions; or (3) go out of business.

Gasoline in tank car quantities is freely available, somewhat as is wheat or corn. Anyone desiring to purchase wheat or corn in carload quantities may so do. On any public grain exchange he can buy carload quantities at the same price paid by either the largest or the smallest miller (except for grain exchange commissions).

Tank car spot market quotations for gasoline are publicly printed.[4] While most jobbers prefer the continuity of doing

[4] See market quotations daily in Chicago Journal of Commerce and many other trade publications.

business with the same supplier, any petroleum buyer with facilities to purchase gasoline in tank car quantities can do so at tank car prices. There are a substantial number of refiners who sell only in tank car quantities and still many others who sell only at wholesale in particular markets. Jobbers will always be able to buy from these suppliers at tank car prices.

It follows that the order will not eliminate the jobber nor can it prevent him from buying at tank car prices. We now show that by imposing restrictions which prevent dual distribution by refiners, the Commission's order, without warrant, imposes an undue restriction on jobbers whose suppliers also sell to retailers and limits the source of supply available to all jobbers.

B. THE COMMISSION'S ORDER WILL EFFECTIVELY PREVENT JOBBERS FROM OBTAINING THEIR SUPPLIES FROM REFINERS ENGAGED IN DUAL DISTRIBUTION.

Paragraph 6 of the order prohibits petitioner from selling to jobbers at a price lower than petitioner charges to retailers who compete with the customers of its jobbers, if petitioner has actual or constructive knowledge that the jobber resells below petitioner's posted tank wagon price or grants any service or facility having the effect of a reduction in price (R. 5256).

This provision has the effect of requiring petitioner to discontinue selling to any jobber who resells below petitioner's posted tank wagon price or grants any service or facility (i.e. a new pump, painting a station, etc.) which amounts to a reduction in price. The prohibition applies without regard to whether the jobber is required by good faith competition with others to make the price reduction. Paragraph 6 of the order coerces jobbers into maintaining rigid resale prices, fixed by petitioner's posted tank wagon price, under penalty of being cut off from their source of supply.

The jobber of petroleum products is generally engaged in intrastate commerce (except in those cases where he operates in two states) and is not subject to the Clayton Act. This order, however, not only extends the Act to jobbers in intrastate commerce, through control of their suppliers, but imposes restrictions on the competitive conduct of independent jobbers which the Act itself does not require.

The Clayton Act, as amended by the Robinson-Patman Act, does not prohibit anyone from reducing his price when he does so to all his customers. But this order prohibits independent gasoline jobbers from reducing their prices, unless *the petitioner* reduces its posted tank wagon price.

The Act does not prohibit jobbers from lowering their price, or furnishing free facilities such as a new pump, to any customer when doing so does not have the specified effect on competition. But this order prohibits independent gasoline jobbers from doing any of these things unless his supplier elects to lower its price or grant a similar service.

The jobber who buys from a dual distributor is simply denied the right to compete with jobbers whose suppliers sell only in tank car quantities. He is both denied the right to compete for new customers or even to hold his present customers against a competitive price cutting attack. He is denied the right to engage in good faith competition as effectively and as completely as though his supplier could and did lawfully dictate the prices and terms of sale at which he must do business. His course of conduct is prescribed for him, not by the performance of competitors, but by the conduct of his supplier toward its retail customers.

All sales initiative, competitive activity and even self-defense against price cutting attacks is to be determined for the independent jobber by his supplier.

A Report to the Temporary National Economic Committee in 1941 by the Commission's staff (printed as Monograph No. 42) argued that the good faith meeting of an equally low price was an absolute defense. It said—"The right of self-defense against competitive price attacks is as vital in a competitive economy as the right of self-defense against personal attack."[5]

We assume it is conceded that the country's 12,000 gasoline jobbers should be permitted to do business in "a competitive economy." The criminal law guarantees the individual an unlimited "right of self-defense against personal attack." Jobbers ask no more than, but insist upon, "the right of self-defense against competitive price attacks." The foregoing statement is by the late Walter B. Wooden, the Commission's chief advocate in pricing matters. It is as strong a statement of the necessity for engaging in good faith competition to meet the equally low price of competitors as the English language permits.

Paragraph 5 of the order prohibits petitioner from selling gasoline to jobbers, for resale at retail to consumers, at a lower price than the petitioner charges its retailer customers (R. 5256). Again, however, the restriction applies only to suppliers with dual distribution. The refiner who sells only in tank car quantities may sell at the tank car price without regard to the manner in which the buyer may resell the gasoline.

Jobbers have heretofore thought that when they purchased gasoline in a competitive market at a competitive price it became their property. They have believed that gasoline purchased by them was theirs to dispose of in any lawful manner. The law does not prohibit gasoline jobbers

[5] Report prepared by Walter B. Wooden and Hugh B. White of the Commission's staff and submitted to the Temporary National Economic Committee by the Commission's Director of T.N.E.C. Studies. Monograph No. 42, p. 139.

from also operating retail stations. Gasoline is not a packaged or trade marked article where the product of one seller may differ widely from that of other sellers. Tank car buyers can and will continue to buy at tank car prices without regard to the use to which they may put the product.

This requirement of the order can only force jobbers who also operate service stations to buy their gasoline from suppliers who sell only to tank car buyers. Present dual suppliers will be encouraged, if not compelled, to buy out their jobbers in order to protect desired distribution. This is directly contrary to the Commission's professed objective of seeking to prevent acquisitions that lessen competition.

The order, of course, does permit a jobber discount equal to savings in costs on sales to jobbers. The Circuit Court, as shown above, thought it was not unjust to eliminate the jobbers if their "existence cannot be justified except on the exploitation of a differential in price not justified by cost savings."

To make the refiner's savings in cost the measure of the jobber's margin is both unwarranted and unjust. It would result in further concentration in the oil industry by forcing some refiners to take over the distribution functions now performed by many of the jobbers. Cost savings allow the jobber a discount equal to only the major oil companies' cost of distribution (which is subject to fluctuation from time to time, leaving the jobber no basis for planned business operation). Assuming that the independent jobber can distribute gasoline as economically as the major oil companies, the cost saving differential would allow him nothing for return on investment, profit or general overhead. Obviously this means the elimination of the jobber, at least as far as his obtaining his supplies from a dual distribution supplier. There is nothing in the Act, or in its legislative

history, to sustain the belief that Congress intended to impose any such restriction on jobbers.

The jobber also performs services in addition to the physical distribution of gasoline. These services include the development of outlets, sales stimulation, supplying and maintaining equipment such as pumps, tanks, lifts and air compressors, extending credit, servicing accounts, soliciting new accounts, advertising and otherwise creating good will.

Retail gasoline dealers, who are apparently convinced that they will profit from the order, have suggested that the order fix the jobber discount.[6] The jobber's answer to that suggestion is no different than would be that of the retailer to a suggestion that the law fix the margin of the retailer's mark-up. Why is the jobber to be denied the opportunity to buy at a competitive price and to make a profit in a competitive industry? Why should such a restraint be imposed upon jobbers, and competition among them virtually prohibited, in order to enable some retailers to achieve individual transitory stability through the elimination of price cutting (even assuming that the order in this case will eliminate price cutting—an assumption which in fact is not supported by the Commission's findings)?

It has been inferred that the 1½¢ a gallon jobber functional discount is excessive. The fact is that 1½¢ was then the low point in the range of the jobber discount (R. 951). The record is that the average was then 2¢ and the maximum about 3¢ (R. 951). In *United States* v. *Socony-Vacuum Oil Co.*, et al., (Indictment No. 11364, Western Dist. of Wisc., filed December 22, 1936) major oil companies were indicted under the Sherman Act for conspiring *to restrict* the jobber

[6] See brief of *Amicus Curiae* for Retail Gasoline Dealers Association of Michigan, Inc., in the Circuit Court, p. 33.

margin to 2¢. The generally prevailing jobber margin is now 2½¢ and upward.

This order makes the burdens of dual distribution so great that, even in the unlikely case that the jobber could continue buying from a dual supplier, it does not seem possible for such refiners to continue to sell to jobbers. If required to abandon its dual distribution, it is not difficult to imagine which customers petitioner will abandon. Only 18% of its business in Detroit was with jobbers (R. 4879).

When another major oil company desired to eliminate its jobbers, a Committee of Congress was prompt to express its disapproval.

A Report of the Senate Small Business Committee (1949) on "Oil Supply and Distribution Problems,"[7] says—

> "The most disturbing indication of a plan to eliminate the independent oil jobber was contained in a speech made by a vice-president of Standard Oil Co. (Ohio) before the American Management Association just prior to the opening of the oil subcommittee hearings. His efforts to explain his remarks about savings in the industry by 'elimination of the wholesale jobber' fell far short of convincing."

Gasoline jobbers are essentially small businessmen for whose welfare the Congress has frequently expressed concern as is shown by the activities of the Congressional Small Business Committees.

The record does not indicate what proportion of the 12,000 jobbers are supplied by refiners with dual distribution. Presumably the situation varies in different communities. Regardless of whether dual or single distribution preponderates in an area, the elimination of dual distribution will inflict a harsh result on jobbers without a corre-

[7] Report No. 25 (81st Congress) Senate Special Committee to Study Problems of Small Business, January 31, 1949, pp. 8-9.

sponding public benefit. In communities where most of the jobbers may buy from suppliers who have dual distribution, this arbitrary requirement is inflicted upon the great bulk of the jobbers and prohibits what is the normal business practice, and will require almost revolutionary changes in methods of distribution in such communities; many of whom will be required to change their brands or go out of business. In the communities where the jobbers who buy from suppliers with dual distribution are in the minority, the order imposes upon those jobbers a restriction which is not applied to the majority of their competitors, who remain free to buy from their suppliers at tank car prices. In these areas jobbers purchasing from dual distributors will be at the mercy of their competitors whose suppliers sell only in tank car quantities.

Theoretically a refiner need only avoid selling to both wholesalers and retailers in the same territory to avoid the restrictions upon dual distribution. Practically, however, this can only be accomplished by an insulating area between the two territories in which the refiner has no jobber or retailer customers. Otherwise there would always be the probability of injury to a retailer near the edge of one territory through competition with a jobber, or a customer of a jobber, in the adjacent territory. Gasoline stations several miles apart may be in actual competition with one another.[8] The elimination of dual distribution will have dire consequences not only upon jobbers now dealing with dual distributors but upon jobbers generally.

With respect to jobbers now obtaining their supplies from dual distributors, many of whom have devoted their adult lives to building up their individual businesses on the foundation of the supplier's brand name, they will be com-

[8] See brief of *Amicus Curiae* for Retail Gasoline Dealers of Michigan, Inc. in Circuit Court, pp. 4-5.

pelled to sacrifice their life's effort. The capital which they have invested, the good will they have developed with their customers, will all be jeopardized as they will be faced with the necessity of commencing anew to build up patronage for a different and competitive brand.

With respect to jobbers not now buying from a dual distributor, particularly new jobbers entering the field, the market in which they will seek their source of supply will be arbitrarily narrowed. Competition for their business as well as sales to them will be restricted to suppliers not having their own direct distribution in the same area. It cannot be over-emphasized that this will have no effect upon the price level at which jobbers will buy—they will continue to buy at the tank car price—but some suppliers will be prevented from competing for their trade.

There is no compelling or justifiable reason to force these men to make the choice between going out of business, selling out to their suppliers, or transferring their business to a supplier who sells only at wholesale.

C. MEETING THE PREVAILING JOBBER PRICE IN GOOD FAITH DOES NOT INJURE COMPETITION AND ITS PROHIBITION IS CONTRARY TO SETTLED NATIONAL POLICY.

The public policy of the United States, frequently expressed by the Congress, is full adherence to the competitive system. The Commission professes to advocate competition. In a recent Report to the Congress,[9] it said—

> "The capitalist system of free initiative is not immortal, but is capable of dying and of dragging down with it the system of democratic government. * * * Either this country is going down the road to col-

[9] Report of the Federal Trade Commission on the Merger Movement (1948) p. 69. While the remarks were directed at the elimination of competition through monopoly, they are equally applicable to the elimination of competition from any cause.

lectivism, or it must stand and fight for competition as the protector of all that is embodied in free enterprise."

This order actually prohibits *good faith competition*, although the basic function of the antitrust laws is to compel competition in industry. Restrictions upon a seller's freedom to compete *in good faith* are abhorred.

The Commission's philosophy underlying this order seems to be that the financial stability of some retail gasoline dealers in Detroit must be maintained, even at the expense of the undermining of the stability of the competitive economy as a whole, and particularly the jobbers.

The December 1948 Report to the President of the Council of Economic Advisers, criticizing the recent tendency to prohibit "pricing making policies previously accepted as legitimate features of hard rivalry for business," says[10]—

> "The philosophy of the Sherman Act appears to be yielding to a policy of 'ethical competition' which does not differentiate between the stability of the individual firm and the stability of the total economy."

All price fixing conspiracies have as their ultimate objective promoting the "stability of the individual firms" that enter into the combination. But all conspiracies are uniformly struck down by this Court because they are destructive of the "stability of the total economy."

The petitioner proved that its lower price to each of its four jobber customers was made in good faith to meet or partially meet specific offers of competitors to each of these jobber customers for gasoline of comparable grade and quality (R. 5099-5104). It has not been denied that if

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[10] Council of Economic Advisers Third Annual Report to the President (December, 1948) p. 15.

petitioner had not made the lower price to these jobbers it would have lost them as customers. The evidence in the record on the petitioner's good faith meeting of equally low or lower prices to retain these jobbers as customers was said by the Circuit Court to be overwhelming. Nor was it disputed by the Trial Examiner, or the Commission, who assumed that the showing of good faith had been established (Supra, pp. 5-7).

Irrespective of the showing of good faith by proof of meeting specific offers of its competitors for gasoline of comparable grade and quality, as far as the jobber is concerned the fact is that jobbers must, and will, continue to purchase at tank car prices as low or lower than those charged by petitioner in order to continue in business. If petitioner's jobber customers can be expected to buy at those prices, regardless of their source of supply, how can the fact that they purchased from petitioner possibly result in an injury to competition?

Let us assume that price cutting by tank car buyers or their customers results in a competitive disadvantage to retailers who purchase at tank wagon prices. That disadvantage, however, does not result from the petitioner meeting *in good faith* the equally low price at which its competitors may lawfully sell to jobbers who resell below petitioner's posted tank-wagon price. *The disadvantage results from the fact that the distributors of other brands may lawfully engage in that practice.* The disadvantage would not be different if the jobber had purchased from a refiner (competing with petitioner) who sold only to tank car buyers. The good faith meeting of the prevailing market price at which competitors are lawfully selling does not injure competition.

To prohibit sellers from making sales which their competitors are free to make does not prevent injury to com-

petition—it prevents competition. Nor is competition at the retail level protected from injury by transferring business from refiners who sell to both jobbers and retailers to those refiners who sell only to jobbers.

The error in the Commission's logic results from its treating injury to a competi*tor* as being synonymous with injury to competi*tion*. Competition is a contest in which business rivals are the contestants. In any such contest someone is likely to be affected adversely, but it does not follow that the contest has been lessened.

The statement of the House Managers accompanying a Conference Report recently approved by the House[11] is in part—

> "Competition is a contest between sellers for the business of a buyer. In such a contest one seller gets the order while other sellers lose the order. That is competition. * * * In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured. 'Competition,' Mr. Justice Holmes observed, 'is worth what it cost.'
>
> "We must always distinguish between injury to competition and injury to a competitor. To promote and protect competition is the primary function of the antitrust laws. However, we cannot guarantee competitors against all injury. This can only be accomplished by prohibiting competition."

This order seeks to protect individual competitors at the retail level from the effects of competition by in fact prohibiting competition.

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[11] Conference Report (House Report No. 1422) on S.1008 filed October 13, 1949, approved by the House of Representatives, October 14, 1949.

If is not claimed that the practice complained of injured competition between the petitioner and other suppliers. As the lower court held, its sales in good faith competition with other refiners would not injure competition at that level. But this order lessens competition between refiners.

It is not claimed that competition was injured at the wholesale level. An increased number of sellers competing in good faith for the business of jobbers does not injure competition. Nor does the good faith meeting of an equally low price of other jobbers injure competition between them. But this order also lessens competition at that level.

Finally, the good faith meeting of an equally low price cannot be regarded as injuring competition at the consumer level. This order—designed to maintain rigid retail prices—merely deprives the consumer of the benefits of competition.

The four jobbers to whom petitioner made its lower tank car price could have purchased at tank car prices from other suppliers. One hundred twenty-six other Detroit jobbers in fact purchased from other suppliers at tank car prices, and it was the price action of such competitors as a class that adversely affected retailers.

We have shown above that those who remain in the jobbing business will continue to purchase gasoline at tank car prices. We have shown that competition is not injured when a supplier sells to jobbers at the price at which its competitors lawfully sell to jobbers. The seller's good faith in meeting the equally low price of a competitor is also apparent when he sells at the price at which his customer can purchase comparable products from others. Even apart from the specific offers in evidence, the fact that tank car prices are readily and lawfully available to jobbers in Detroit, as elsewhere throughout the United States, makes

it apparent that in selling to its jobbers at the tank car price petitioner acted in good faith.

The avowed purpose of this order is to prevent price cutting at retail stations by denying jobbers the right to engage in competitive pricing. The Commission attempts to accomplish this by compelling their suppliers to control the jobber's resale prices. Price cutting can be avoided only by requiring all sellers to maintain rigid resale prices, and even then OPA experiences indicated that such prices could not be enforced by law unless justified by a supply and demand relationship approximating such price levels.

This order forces the petitioner to follow a course of conduct which, if adopted on its own initiative, would undoubtedly be held to impose illegal control over jobber resale prices. The order compels jobbers to follow a course of conduct which, if adopted by themselves or by agreement with their supplier, would in all probability be held to be a conspiracy in restraint of trade. These competitive restraints are no less iniquitous or burdensome because they are required by an order of the Federal Trade Commission.

Assume petitioner had asked its jobbers to maintain rigidly petitioner's posted tank wagon price. Those jobbers who did so, knowing that others had been asked to, and must do so for the success of the plan, would probably be charged with a conspiracy in restraint of trade under the Sherman Act. On substantially similar facts this Court found a conspiracy in *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208 (1939).

While petitioner has not written its jobbers asking them to maintain its posted tank wagon price, the Circuit Court has published a decision which tells those jobbers that they must maintain petitioner's posted tank wagon price under penalty of being cut off from their source of supply.

Assume the petitioner adopted a program of investigating prospective jobber customers to determine their price maintenance practices and refused to sell to those who indulged in price cutting. On substantially similar facts this Court found, in *Ethyl Gasoline Corporation* v. *United States*, 309 U. S. 463 (1940), an illegal control over jobber resale prices.

Even price maintenance at the retail level, in intrastate commerce, is unlawful under state antitrust laws. In *State of Wisconsin* v. *Retail Gasoline Dealers' Association of Milwaukee, Inc., et al.*,[12] the association and certain of its members were found to have conspired to main ain retail gasoline prices. The court found that the association sent bulletins to its members suggesting resale prices which were adhered to by more than 90% of its members, while only 55% of non-member dealers to whom the bulletins were sent maintained the suggested price.

This order requires what it is the purpose of the antitrust laws to prevent. It does not prevent injury to competition, it prevents competition. To sustain this order is to encourage price maintenance practices now regarded as illegal. We submit that the order is contrary to settled national policy.

D. THE COMMISSION'S CONSTRUCTION OF SECTION 2(b), ADMITTEDLY PRODUCING A RESULT NOT IN THE PUBLIC INTEREST, IS UNREASONABLE AND ILLOGICAL.

The Federal Trade Commission has repeatedly urged—both during the time the case was pending below and since the decision of the Court of Appeals—that the good faith meeting of a competitor's equally low price *should* be a full defense to a charge of price discrimination.

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[12] Circuit Court of Milwaukee County, Wisconsin, Case No. 213-601, May 11, 1949, C.C.H. Trade Regulation Service, p. 62, 284, ¶ 62, 448.

Its publicly released Policy Statement of October, 1948 said good faith meeting of an equally low price was a defense to a charge of price discrimination, but a footnote added that in this case, then pending in the court below, the Commission was "seeking to ascertain" whether the defense was available where there was "proof [of] the statutory injury to competition."[13]

In January 1949 the Commission told a Senate Committee that good faith meeting of an equally low price should be a full defense because "the policy of the law should not discourage active competition by preventing the meeting of competition in good faith."[14] Three weeks after the decision of the court below, the Commission told another Senate Committee it saw no objection to a change in the law to make good faith meeting of an equally low price a full defense.[15]

In June 1949 the Commission told a House Committee that "all of the Commissioners believe it would be preferable to make the good faith meeting of competition a complete defense," because failure to do so "necessarily involves the risk of impairing the vigor of competition among sellers."[16]

Presumably the Commission entered, and now supports, this order (although strongly urging it should not be the law) because of strong convictions that its construction is required by the clear language of the statute and the expressed Congressional intention. Although the Commis-

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[13] Notice to Staff, dated October 12, 1948, by Federal Trade Commission, publicly released on that date.

[14] Printed Hearings on S.236 (81st Congress) before a subcommittee of the Senate Interstate and Foreign Commerce Committee, p. 274.

[15] Printed Hearings on S.1008 (81st Congress), before a subcommittee of the Senate Committee on the Judiciary, p. 72.

[16] Printed Hearings on S.1008 (81st Congress) before a subcommittee of the House Committee on the Judiciary, p. 61.

sion's anomalous position cannot otherwise be justified, there is no clear basis on which to support its construction of the statute. The available authorities all support that construction of Section 2(b) which makes the good faith meeting of an equally low price a full defense. Petitioner has shown that the face of the statute (Brief pp. 19-21) as well as the legislative history (Brief pp. 27-28) support this construction of the statute.

The petitioner's brief (p. 25) points out that in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948), this Court held that a price difference to competing customers was itself sufficient to support a finding of injury to competition. This makes Section 2(b) meaningless if good faith meeting of competition is not a full defense. But the Commission has now gone a step further and in effect said that a seller's proof that his lower price was made in good faith to meet competition is itself proof of the required adverse effect on competition. In the Minneapolis-Honeywell order[17] the Commission said—

> "The competitive effects of respondent's discriminatory prices on other manufacturers of controls are persuasively indicated by its own arguments that its discriminatory prices were made for the purpose of meeting competition. These arguments show that repondent's discriminatory prices were made to retain the business of others and that they were largely successful in doing so. *To the extent that business is held by or diverted to respondent from its competitors by its discriminatory prices and unfair practices, competition has been adversely affected within the meaning of the law.*"

This Court has in three cases had occasion to consider the construction of Section 2(b). In each instance it assumed that the showing of good faith meeting of a

[17] Order entered January 14, 1948 in In The Matter of Minneapolis-Honeywell Regulator Co., Docket No. 4920.

competitor's equally low price was a full defense to a charge of price discrimination.[18]

The Commission's 1941 Report to the Temporary National Economic Committee (Printed as Monograph No. 42) expressly asserted that the good faith meeting of an equally low price was a full defense to a charge of price discrimination under Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act.[19]

The Assistant Attorney General in Charge of the Antitrust Division (Herbert A. Bergson) has testified before a Senate Committee that *the present law* "permits sellers to justify otherwise forbidden price discrimination on the ground that the lower prices to one set of buyers were made in good faith to meet the prices of a competitor,"[20] and testifying before a House Committee he recommended the elimination of a statutory amendment that would have

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[18] See *International Salt Company* v. *United States*, 332 U. S. 392, 3 (1947) where this Court said—"Of course, the Clayton Act itself permits one charged with price discrimination to show that he lowered his price in good faith to meet competition. Obviously, the District Court was not intending to prevent competition or to disable the appellant from meeting or offering it. The Government, too, says it would not oppose permitting a lower price to meet, in good faith, the equally low price of a competitor if the need arose." In *Federal Trade Commission* v. *Cement Institute, Inc., et al.*, 333 U. S. 683, 6 (1948) this Court said—"Section 2(b) permits an individual company to sell one customer at a lower price than it sells to another if the price is 'made in good faith to meet an equally low price of a competitor.'" And in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945) this Court noted "that the *defense* is that the price discriminations were made in good faith to meet competition" (p. 752) and that "the *defense* is a matter of evidence in each case" (p. 753).

[19] Report prepared by Walter B. Wooden and Hugh B. White of the Commission's staff and submitted to the Temporary Economic Committee by the Commission's Director of T.N.E.C. Studies. Monograph No. 42, p. 139.

[20] Printed Hearings on S.236 (81st Congress) before a subcommittee of the Senate Interstate and Foreign Commerce Committee, p. 77.

confirmed the decision of the court below.[21] The Assistant to the Attorney General (Peyton Ford) later wrote the Senate Committee confirming that *the present law* makes good faith meeting of an equally low price a full defense.[22]

Even the Commission's Associate General Counsel (Robert B. Dawkins) testified before a Senate Committee that *the present law* made the good faith meeting of an equally low price a full defense, although as must be expected in view of the pendency of this case he added that others held a contrary view).[23]

The construction which the Commission has given the statute cannot be sustained by the plain language of the Act. It produces a result which the Commission has urged should not be the law.[24] The construction given runs contrary to the public interest and no economic public benefit can flow therefrom. The Department of Justice opposes the Commission's construction of the statute, as does its Associate General Counsel. This Court has assumed that the statute makes the showing of good faith meeting of an

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[21] Printed Hearings on S.1008 (81st Congress) before a subcommittee of the House Committee on the Judiciary, p. 12.

[22] Printed Hearings on S.236 (81st Congress) before a subcommittee of the Senate Interstate and Foreign Commerce Committee, p. 320.

[23] *Ibid.*, pp. 92-3.

[24] Senate Bill 1008 is now pending in the Congress. In a form making the good faith meeting of a competitor's equally low price a full defense to a charge of price discrimination, the bill was approved by the Attorney General, the Federal Trade Commission, the Council of Economic Advisers, and the White House. See Congressional Record, July 6, 1949, page 9164. The Conference Report on the Bill (filed October 13, 1949, approved by the House October 14, 1949, and set for consideration by the Senate January 20, 1950) makes the good faith meeting of an equally low price of a competitor a full defense to a charge of price discrimination, subject to the limitation that the provision shall not make lawful any combination, conspiracy or unlawful agreement; or any monopolistic, deceptive, fraudulent or oppressive practice. House Report No. 1422.

equally low price a full defense to a charge of price discrimination. We submit that it does do so.

CONCLUSION

It is respectfully submitted that the real parties in interest here are the gasoline jobbers who were not before the Commission. We urge that the order should be reversed.

Respectfully submitted,

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